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Kerajaan Malaysia v Batu Kemas Industri Sdn Bhd and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS A-01(W)-242–04 OF 2022, A-01(W)-243–04 OF 2022 AND A-01(W)-247–04 OF 2022
NANTHA BALAN, MOHD NAZLAN AND CHOO KAH SING JJCA
17 JANUARY 2025

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Damages — Assessment — Appeal against assessment — Parties not satisfied with assessment order made by High Court — Whether pre-judgment and/or post-judgment interest on judgment sums ought to be awarded — Whether High Court's award of RM35m for replacement cost of machinery and equipment was justified — Whether High Court wrong in law to award damages based on documents that were marked as 'ID' — Whether High Court went beyond scope of assessment ordered by Federal Court

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These three appeals emanated from the decision of the High Court which was an upshot of the Federal Court's order ordering certain heads of claim to be remitted back to the High Court for assessment of damages as suffered by the plaintiff ie Batu Kemas Industri Sdn Bhd ('Batu Kemas') against the defendants ie Government of Malaysia and Tenaga Nasional Bhd ('TNB'). The

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Federal Court ordered the quantum of the alleged loss and damage to be assessed by the High Court. After having held the assessment hearing, the High Court made the order ('the assessment order'). The parties were not satisfied with the assessment order and appealed. Appeal 242 was filed by the Government of Malaysia challenging the amount as awarded in para (f) of the

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assessment order ie the replacement cost of machinery or other equipment physically damaged or the repair costs amounting to RM35m. Appeal 243 was filed by Batu Kemas challenging para (h) of the assessment order in that the High Court should have awarded post-judgment interest, and that the High Court ought to have exercised its discretion to award pre-judgment interest

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from the date of incident or that at least from the date of filing of the claim, at a rate equivalent to post-judgment rate. Appeal 247 was filed by TNB on two main complaints: (a) the amounts awarded in paras (b) to (e) in that the documents relied on to support the claims by Batu Kemas for the items claimed in paras (b) to (e) were marked as 'ID' documents, and they were never

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tendered/converted as exhibits of the court. Therefore, they were inadmissible evidence. The learned High Court judge ('HCJ') was wrong in law to award damages based on documents that were marked as 'ID'; and (b) the award in para (f) in that the HCJ went beyond the scope of assessment ordered by the Federal Court.

Held:

(1) The Federal Court order did not mention pre-judgment or post-judgment interest to be awarded. It was not wrong for the HCJ not to grant any pre-judgment interest in his judgment, but to follow the instruction strictly from the Federal Court to only consider those items as directed in its order. There was nothing plainly wrong had been committed by the HCJ in not exercising his discretion to award pre-judgment interest. With regard to post-judgment interest, based on O 42 r 12 of the Rules of Court 2012 post-judgment interest was a statutory interest, as opposed to pre-judgment interest which was based on the judge's discretion. Although the Federal Court did not rule on the post-judgment interest, the law had provided that the judgment debt shall carry interest once it had been ordered by the court. Therefore, interest of 5%pa chargeable on the judgment debt to be calculated from the date of the judgment until to the date of full settlement ought to be awarded (see paras 8, 11 & 14).

(2) There was no cross-examination on the figures highlighted by PW9 as damages. Therefore, the HCJ was not wrong to accept that damage to the machinery and equipment had been proven as well as to accept the amount suggested as damages but with some adjustment. Since all parties had accepted the sum of RM35m as the awarded sum for the damages in para (f), therefore the awarded amount in the final order would not be disturbed. With regard to the sum of RM58,911.857.10 offered as the replacement costs by Batu Kemas, the HCJ was entitled to reject it. The HCJ was entitled to make adjustment of the two proposed amounts as damages which he considered as just and reasonable to come to a sum of RM35m. Therefore, there was no reason to disturb the findings of the HCJ and his decision in para (f) of the assessment order (see paras 29 & 31–32).

(3) Although the HCJ was satisfied that damage to the brake motor and transformer had been proven and that technical advice was rendered, that went to proving liability, not proving damages. Therefore, the HCJ could not for that reason arbitrarily allow the claims which were supported by 'ID' documents. In addition, during the earlier trial, the evidence in support of the assessment of damages was adduced and ventilated, and those 'ID' documents were not marked as exhibit, vis a vis they were not evidence before the court and could not be considered. Batu Kemas could have well proved its entitlement to those heads of claim, but that did not translate to the amount of damages to be awarded. To prove the entitlement to a compensation amount was distinct from proving entitlement to the heads of claim. Batu Kemas had suffered loss and damage, but whether Batu Kemas was entitled to claim the amount of the compensation still depended on what documentary evidence had been

admitted as evidence for consideration of the court. The evidence before the court could not include documents marked as 'ID' or indirect documentary evidence suggesting potential losses and damages. Therefore, only a nominal sum of RM1,000 for each head of the claims as damages, namely, RM1,000 be awarded respectively for paras (c), (d) and (e) was awarded (see paras 41 & 43–45).

(4) It was clear from the order and the grounds of judgment of the Federal Court, High Court had assessed those items as ordered by the Federal Court. The HCJ did not act outside the scope of the Federal Court order and direction. Therefore, TNB's submission on the second complaint was rejected. The following orders were made: (a) Appeal 242 was dismissed; (b) Appeal 243 was allowed to the effect that interest of 5%pa was chargeable on the judgment debt; and (c) Appeal 247 was allowed in part (see paras 56, 57 & 59–60).

[Bahasa Malaysia summary

Tiga rayuan ini berasal daripada keputusan Mahkamah Tinggi yang merupakan susulan daripada arahan Mahkamah Persekutuan yang mengarahkan tuntutan tertentu dikembalikan ke Mahkamah Tinggi untuk penilaian ganti rugi yang dialami oleh plaintif iaitu Batu Kemas Industri Sdn Bhd ('Batu Kemas') terhadap defendan-defendan iaitu Kerajaan Malaysia dan Tenaga Nasional Bhd ('TNB'). Mahkamah Persekutuan memerintahkan jumlah kerugian dan kerosakan yang didakwa dinilai oleh Mahkamah Tinggi. Setelah mengadakan bicara penilaian, Mahkamah Tinggi membuat perintah ('perintah penilaian'). Pihak-pihak tidak berpuas hati dengan perintah penilaian dan membuat rayuan. Rayuan 242 difailkan oleh Kerajaan Malaysia mencabar jumlah yang diberikan di perenggan (f) perintah penilaian iaitu kos penggantian mesin atau peralatan lain yang rosak secara fizikal atau kos pembaikan sebanyak RM35 juta. Rayuan 243 difailkan oleh Batu Kemas yang mencabar perenggan (h) perintah penilaian di mana Mahkamah Tinggi seharusnya memberikan faedah selepas penghakiman, dan bahawa Mahkamah Tinggi seharusnya menggunakan budi bicaranya untuk memberikan faedah sebelum penghakiman dari tarikh kejadian atau sekurang-kurangnya dari tarikh pemfailan tuntutan, pada kadar yang setara dengan kadar selepas penghakiman. Rayuan 247 difailkan oleh TNB dengan dua aduan utama: (a) jumlah yang diberikan dalam perenggan (b) hingga (e) di mana dokumen yang disandarkan untuk menyokong tuntutan oleh Batu Kemas untuk item yang dituntut dalam perenggan (b) hingga (e) ditandakan sebagai dokumen 'ID', dan ia tidak pernah dikemukakan/ditukar sebagai ekshibit mahkamah. Oleh itu, ia dianggap sebagai keterangan yang tidak boleh diterima. Hakim Mahkamah Tinggi yang bijaksana ('HMT') salah dari segi undang-undang untuk memberikan ganti rugi berdasarkan dokumen yang ditandakan sebagai 'ID'; dan (b) award dalam perenggan (f) di mana HMT melampaui skop penilaian yang diperintahkan oleh Mahkamah Persekutuan.

Diputuskan:

(1) Perintah Mahkamah Persekutuan tidak menyebut tentang faedah sebelum penghakiman atau selepas penghakiman yang perlu diberikan. Adalah tidak salah bagi HMT untuk tidak memberikan sebarang faedah sebelum penghakiman dalam penghakimannya, tetapi untuk mengikuti arahan secara ketat daripada Mahkamah Persekutuan untuk hanya mempertimbangkan item-item yang diarahkan dalam perintahnya. Tidak ada kesalahan nyata yang dilakukan oleh HMT dengan tidak menggunakan budi bicaranya untuk memberikan faedah sebelum penghakiman. Berkaitan dengan faedah selepas penghakiman, berdasarkan A 42 k 12 Kaedah-Kaedah Mahkamah 2012, faedah selepas penghakiman adalah faedah statutori, berbanding dengan faedah sebelum penghakiman yang berdasarkan budi bicara hakim. Walaupun Mahkamah Persekutuan tidak membuat keputusan mengenai faedah selepas penghakiman, undang-undang telah menetapkan bahawa hutang penghakiman akan dikenakan faedah setelah ia diperintahkan oleh mahkamah. Oleh itu, faedah sebanyak 5% setahun yang dikenakan ke atas hutang penghakiman perlu dikira dari tarikh penghakiman sehingga tarikh penyelesaian penuh perlu diberikan (rujuk perenggan 8, 11 & 14).

(2) Tiada pemeriksaan balas ke atas angka yang diketengahkan oleh PW9 sebagai kerugian. Oleh itu, HMT tidak salah menerima bahawa kerosakan pada mesin dan peralatan telah dibuktikan, serta menerima jumlah yang dicadangkan sebagai kerugian tetapi dengan beberapa penyesuaian. Memandangkan semua pihak telah menerima jumlah RM35 juta sebagai jumlah yang diberikan untuk kerugian dalam perenggan (f), jumlah yang diberikan dalam perintah akhir tidak akan diganggu. Berkaitan dengan jumlah RM58,911.857.10 yang ditawarkan sebagai kos penggantian oleh Batu Kemas, HMT berhak menolak tawaran tersebut. HMT berhak untuk membuat penyesuaian terhadap dua jumlah yang dicadangkan sebagai kerugian yang dianggapnya adil dan wajar sehingga mencapai jumlah RM35 juta. Oleh itu, tiada sebab untuk mengganggu penemuan HMT dan keputusannya dalam perenggan (f) perintah penilaian (rujuk perenggan 29 & 31–32).

(3) Walaupun HMT berpuas hati bahawa kerosakan pada motor brek dan transformer telah dibuktikan dan nasihat teknikal telah diberikan, itu berkaitan dengan pembuktian liabiliti, bukan pembuktian kerugian. Oleh itu, HMT tidak dapat untuk itu membenarkan tuntutan yang disokong oleh dokumen 'ID' secara sewenang-wenangnya. Selain itu, semasa perbicaraan terdahulu, keterangan yang menyokong penilaian kerugian telah dikemukakan dan diperbahaskan, dan dokumen 'ID' tersebut tidak ditandakan sebagai ekshibit, yang mana tidak menjadi keterangan di hadapan mahkamah dan tidak dapat dipertimbangkan. Batu Kemas mungkin telah membuktikan haknya untuk tuntutan

tersebut, tetapi itu tidak diterjemahkan kepada jumlah kerugian yang perlu diberikan. Membuktikan hak kepada jumlah pampasan adalah berbeza daripada membuktikan hak kepada tuntutan. Batu Kemas telah mengalami kerugian dan kerosakan, tetapi sama ada Batu Kemas berhak untuk menuntut jumlah pampasan masih bergantung pada keterangan dokumentari yang telah diterima sebagai keterangan untuk pertimbangan mahkamah. Keterangan yang ada di hadapan mahkamah tidak boleh merangkumi dokumen yang ditandakan sebagai 'ID' atau keterangan dokumentari tidak langsung yang menunjukkan potensi kerugian dan kerosakan. Oleh itu, hanya jumlah nominal sebanyak RM1,000 bagi setiap tuntutan sebagai kerugian, iaitu RM1,000 diberi masing-masing untuk perenggan (c), (d) dan (e) (rujuk perenggan 41 & 43–45).

(4) Jelas daripada perintah dan alasan penghakiman Mahkamah Persekutuan bahawa Mahkamah Tinggi telah menilai item-item tersebut seperti yang diarahkan oleh Mahkamah Persekutuan. HMT tidak bertindak di luar skop perintah dan arahannya. Oleh itu, hujah TNB mengenai aduan kedua ditolak. Perintah berikut dibuat: (a) Rayuan 242 ditolak; (b) Rayuan 243 dibenarkan dengan kesan bahawa faedah sebanyak 5% setahun dikenakan ke atas hutang penghakiman; dan (c) Rayuan 247 dibenarkan sebahagiannya (rujuk perenggan 56, 57 & 59–60).]

Cases referred to

Ashover Fluor Spar Mines Ltd v Jackson [1911] 2 Ch 355 (refd)
Beatrice Ramanathan (F) & Anor v Shah Alam Properties Sdn Bhd & Anor Case [1994] 4 CLJ 646, HC (refd)
Fairview Schools Bhd v Merger Insight (M) Sdn Bhd [2017] MLJU 1031; [2017] CLJU 1047, HC (refd)
Konsortium Kopkad Sdn Bhd v Konsortium Koperasi Pengguna Malaysia Berhad [2015] MLJU 1883; [2016] 4 CLJ 168, HC (refd)
Livingstone v Rawyards Coal Company (1880) 5 App Cas 25, HL (refd)
Ong Boon Him & Anor v Tan Oh Tee & Anor [1937] MLJ 122; [1937] CLJU 45, HC (refd)
Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal [2018] 5 MLJ 561; [2018] 6 CLJ 683, FC (refd)
Trans Elite Equipment Rental Sdn Bhd v PSC-Naval Dockyard Sdn Bhd [2003] 4 MLJ 30; [2003] 4 CLJ 270, HC (refd)

Legislation referred to

Civil Law Act 1956 s 11(1)
Evidence Act 1950 s 73A
Rules of Court 2012 O 42 r 12

Appeal from: Suit No MT 1–21–29 of 1999 (High Court, Ipoh)

Nurhafizza Azizan (with Ng Wee Li) for Kerajaan Malaysia.
Malik Imtiaz Ahmed (with Wong Min Yen, Ahmad Edham Abdulwani, Othman Mohd Munzeer and Abdullah Az-Zubayr) (Zulpadli & Edham) for Batu Kemas Industri Sdn Bhd.
Kenneth Koh Zhong Wey (with Afiq Iskandar b Aziz) (Xavier & Koh Partnership) for Tenaga Nasional Bhd.

Choo Kah Sing JCA:

[1] There are three appeals before us, and they emanate from the same decision of the High Court dated 17 March 2022 which was an upshot of the apex court's order dated 26 April 2018 ordering certain heads of claim to be remitted back to the High Court for assessment of damages as suffered by the plaintiff (Batu Kemas Industri Sdn Bhd) against the defendants (Kerajaan Malaysia and Tenaga Nasional Bhd) respectively (see Federal Court decision in *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561; [2018] 6 CLJ 683).

[2] The apex court ordered the quantum of the alleged loss and damage to be assessed by the High Court, inter alia, to include: (a) the loss of goods in production on 5 August 1998 and the profits thereof; (b) the loss of production on 5 August 1998 and the profits thereof; and (c) the replacement cost of machinery or other equipment physically damaged or the repair cost.

[3] On 17 March 2022, after having held the assessment hearing, the High Court made the following orders:

a) Kerugian pengeluaran pada 5.8.1998 dan keuntungan di sana sebanyak RM7,262.32;

b) Kos penggantian dua (2) unit BSP 600 (DLC control) sebanyak RM1,434,720.00;

c) Brek motor sebanyak RM17,988.00;

d) Kos transformer sebanyak RM4,136.00;

e) Nasihat teknikal sebanyak RM6,200.00;

f) Kos penggantian mesin atau peralatan lain yang mengalami kerosakan fizikal atau kos pembaikkan sebanyak RM35,000,000.00;

g) Bahawa daripada keseluruhan jumlah yang ditaksirkan, pembayaran oleh Defendan-Defendan adalah seperti berikut;

a. Defendan Pertama dan Defendan Kedua perlu membayar 2/3 dari kerugian dan kerosakan seperti yang ditaksirkan kepada Batu Kemas;

b. Liabiliti inter se antara Defendan Pertama dan Defendan Kedua adalah 40% (Defendan Pertama) dan 60% (Defendan Kedua);

h) Tiada perintah untuk faedah dan Kos.

[4] The parties were not satisfied with the High Court's decision dated 17 March 2022 ('the assessment order'). As such, the parties filed their respective appeals and the grounds of appeal are as follows:

(a) Appeal No A-01(W)-242–04 of 2022 ('Appeal 242') was filed by the Government of Malaysia (the first defendant). The Government of Malaysia challenged the amount as awarded in para (f) of the assessment order, ie the replacement cost of machinery or other equipment physically damaged or the repair costs amounting to RM35m ('the Government of Malaysia's appeal');

(b) Appeal No A-01(W)-243–04 of 2022 ('Appeal 243') was filed by Batu Kemas (the plaintiff). Batu Kemas challenged para (h) of the assessment order in that the High Court should have awarded post-judgment interest, and that the High Court ought to have exercised its discretion to award pre-judgment interest from the date of incident (on 5 August 1998), or that at least from the date of filing of the claim (on 1 June 1999), at a rate equivalent to post-judgment rate ('the Batu Kemas' appeal'); and

(c) Appeal No A-01(W)-247–04 of 2022 ('Appeal 247') was filed by TNB (the second defendant), and it has two main complaints. First, it challenged the amounts awarded in paras (b) to (e) in that the documents relied on to support the claims by Batu Kemas for the items claimed in paras (b) to (e) were marked as 'ID' documents, and they were never tendered/converted as exhibits of the court. Therefore, they were inadmissible evidence. The learned High Court judge was wrong in law to award damages based on documents that were marked as 'ID'. The second complaint was in reference to the award in para (f) in that the learned High Court judge went beyond the scope of assessment ordered by the Federal Court.

[5] This court will first deal with Batu Kemas's appeal (Appeal 243) and follow by the Government of Malaysia's and TNB's appeals (Appeals 242 and 247) in seriatim.

BATU KEMAS'S APPEAL (APPEAL 243)

[6] Batu Kemas has raised numerous grounds of appeals in its memorandum of appeal dated 29 June 2022. However, during the hearing of the appeal before this court, the counsel for Batu Kemas informed the court that Batu Kemas would pursue its appeal only on one ground which was the learned High Court judge had failed to award any pre-judgment and/or post-judgment interest on the judgment sums awarded by the court. Batu Kemas prayed for chargeable

interest at the rate of 8% to be calculated on the judgment sum(s) from the date of filing of the suit to the date of full settlement of the judgment sum in its amended statement of claim. However, the learned High Court judge did not consider the claim, the counsel for Batu Kemas submitted.

Pre-judgment interest

[7] On the award of pre-judgment interest, s 11(1) of the Civil Law Act 1956 states 'in any proceedings tried in any court for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment'. An award of pre-judgment interest is not as of right in law. The statute grants the court the discretion whether to award such interest as it thinks fit. The operative words used in the statute are 'the court may, if it thinks fit'. The period in which the court may consider to award interest is between the date when the cause of action arose and the date of the judgment.

[8] We note the Federal Court order dated 26 April 2018 did not mention pre-judgment or post-judgment interest to be awarded. The apex court gave a very specific instruction to the High Court (see paras 3 and 4 of the Federal Court order in para [54] of this broad grounds). It is not wrong for the learned High Court judge not to grant any pre-judgment interest in his judgment, but to follow the instruction strictly from the Federal Court to only consider those items as directed in its order. On this score, we see nothing plainly wrong has been committed by the learned High Court judge in not exercising his discretion to award pre-judgment interest.

Post-judgment interest

[9] With regard to post-judgment interest, the power for the court to grant post-judgment interest is found in O 42 r 12 of the Rules of Court which states 'subject to rule 12A, except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied'. It is clear that 'every judgment debt shall carry interest' and the prevailing rate is 5%pa to be 'calculated from the date of judgment until the judgment is satisfied'.

[10] A judgment debt includes both the principal judgment sum(s) awarded and the pre-judgment interest (if awarded) (see *Trans Elite Equipment Rental Sdn Bhd v PSC-Naval Dockyard Sdn Bhd* [2003] 4 MLJ 30 at p 35; [2003] 4

CLJ 270 at p 279 (CLJ) (HC); the legal proposition in *Trans Elite Equipment Rental Sdn Bhd* has been accepted and affirmed by the Court of Appeal decision in *Fairview Schools Bhd v Merger Insight (M) Sdn Bhd* [2017] MLJU 1031; [2017] CLJU 1047).

[11] Based on the above Rules of Court, post-judgment interest is a statutory interest, as opposed to pre-judgment interest which is based on the judge's discretion. Although the Federal Court did not rule on the post-judgment interest, the law has provided that the judgment debt shall carry interest once it has been ordered by the court. It has been held that where a judgment or order provides for damages to be assessed, the statutory interest does not run until the assessment of damages (see *Ashover Fluor Spar Mines Ltd v Jackson* [1911] 2 Ch 355; *Ong Boon Him & Anor v Tan Oh Tee & Anor* [1937] MLJ 122; [1937] CLJU 45; see also *Konsortium Kopkad Sdn Bhd v Konsortium Koperasi Pengguna Malaysia Berhad* [2015] MLJU 1883; [2016] 4 CLJ 168 (HC)).

[12] A party could not be held liable to pay interest until the party knows what is the judgment debt that he must pay. In the event he fails to pay the judgment debt that he is liable to pay, then it is justified for interest be imposed on the outstanding judgment debt until the judgment debt is satisfied.

[13] Further, once a judgment debt is ascertained and is not satisfied, this means the winning party has been deprived of the enjoyment of the judgment debt. For this reason, it is just that interest be awarded on the ascertained judgment debt if it is not satisfied.

[14] Based on the above reasoning, this court is satisfied that interest of 5%pa chargeable on the judgment debt to be calculated from the date of the judgment (17 March 2022) until to the date of full settlement ought to be awarded.

THE GOVERNMENT OF MALAYSIA'S APPEAL (APPEAL 242)

[15] Before the start of the discussion, it is important to note that the counsel for Batu Kemas had informed this court that the amount awarded in item (b) of the assessment order has been 'subsumed' into item (f) of the same. In other words, the counsel for the Batu Kemas conceded that the replacement costs for the two machines (BSP 600-DI-C Control) have been included in the award of RM35m.

[16] The senior federal counsel ('SFC') did not challenge items (c), (d) and (e) of the assessment order. As far as item (b) is concerned, since the amount awarded has been considered as 'subsumed' into item (f), therefore, this court

would consider that the SFC is also challenging the amount of item (b) via the challenge of the awarded amount in item (f) of the assessment order.

[17] The main contention of the SFC is that Batu Kemas failed to adduce evidence to support its entitlement in item (f) of the assessment order. It is trite law that the claimant bears the burden of proof that he is entitled to the damages claimed.

[18] Batu Kemas produced an evaluation report prepared by one property consultancy and registered valuers, Fadzilah & Fikri Sdn Bhd. The said report was signed off by one Mohd Fikri bin Abdullah ('PW9'). The said report estimated the market value for the plant, machinery and equipment utilised to produce calcium silica lime bricks which were owned by Batu Kemas was in the sum of RM70m at the time of valuation as at 17 January 2012 (see encl 50, pp 102–190/412). The method of evaluation subscribed to in the report was the current gross reinstatement cost.

[19] This court observes item 7 listed in the section of 'Inventory of Plant & Machinery Equipment' in the report stated as follows:

7	PRESS SECTION – BSP 600 PRESS 1 full automatic sand lime brick press1 1 oil cooler for press1 1 dust control for press 1 electronic control for press1 1 full automatic sand lime brick press2 1 oil cooler for press2 1 dust control for press2 1 electronic control for press2

[20] Item 7 is the same item as awarded in item (b) of the assessment order. Therefore, it is correct that the awarded sum in item (b) ought to be subsumed into item (f) of the assessment order, otherwise, there would be a double recovery.

[21] During the hearing of the assessment of damages, parties agreed that they would be relying on the evidence adduced during the earlier trial and no further evidence would be adduced by both parties (see E42 *rekod rayuan tambahan* 2, p 12/61 pdf (case Appeal 242)).

Analysis

[22] This court observes several issues pertaining to the sum awarded in item (f) of the assessment order. First, in the notes of proceedings recorded in E42, *rekod rayuan tambahan* 2 (Appeal 242), p 56/61 pdf, line 1211, it was stated that the High Court awarded RM25m for item (f), as opposed to the amount of RM35m as stated in the fair assessment order.

[23] Secondly, counsel for Batu Kemas submitted that the replacement costs for the machinery and equipment based on the quotation given by one WKB Systems Gmbh was Euro 12,793,020, and based on the Bank Negara exchange rate as at 10 December 2019 of RM4.6050 per Euro, therefore, Batu Kemas was entitled to the sum of RM58,911,857.10. However, at para 45 of the submission, the amount stated was the sum of RM56,607,238.80 (see E40, *rekod rayuan* Jld 2(36), *Bahagian C*, p 43/91 pdf, (Appeal 242)).

[24] This court further observes that there were three amounts presented before the learned High Court judge for consideration, first, RM70m (based on the report presented by PW9), secondly, RM58,911,857.10 (as submitted by Batu Kemas' counsel based on the quotation given by one WKB Systems Gmbh) and lastly, RM56,607,238.80 (as submitted by Batu Kemas's counsel as mentioned above). After having scrutinised the submissions, this court is of the view that the last amount could have been a clerical mistake, and could be ignored. Therefore, two amounts were left for consideration, they were RM70m and RM58,911,857.10.

[25] The High Court awarded RM35m as damages in item (f). The learned High Court judge had considered the following, first, there was no proof that Batu Kemas intended to occupy the factory and repair the damage; secondly, the learned High Court considered that Batu Kemas was wound up at that material time, and therefore, the claim for full replacement costs of the machinery at its current market value was unreasonable; and lastly, the learned High Court judge, after taking into consideration the proposition in the case of *Beatrice Ramanathan (F) & Anor v Shah Alam Properties Sdn Bhd & Anor Case* [1994] 4 CLJ 646, reduced the proposed sum(s) to RM35m as just and reasonable amount for damages for the replacement or repair costs.

[26] It is trite law that awarding damages is 'to put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation' (see *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 (HL), p 39, in which the legal principle has been adopted in the Malaysian law on award of damages). It is also trite law that the burden of proof lies with the party who is seeking damages to prove there was in fact damage and the amount of damages.

[27] In the present case, it was not denied by the defendants that the machines and equipment belonging to the plaintiff were damaged. With regard to the sum of damages, Batu Kemas had offered two amounts, one RM70m, and the other RM58,911.857.10 as the replacement costs. The learned High Court judge observed that the defendants did not challenge that the calculation for the damages offered by PW9 was wrong nor did the defendants offer any alternative methods of calculation, and that there was not an iota of evidence was adduced by the defendants to rebut or challenge the quantum of damages presented by Batu Kemas. Therefore, the learned High Court judge found that Batu Kemas had discharged its burden of proof.

[28] The SFC submitted that PW9 had not previously evaluated a factory's machinery that produces lime brick and that not all items were evaluated because some were lost or stolen. In other words, the figure offered was an inaccurate estimation and not substantiated with evidence to support the amount claimed. SFC further submitted that it was not the defendant's burden to disprove the damages claimed. This court observes that the learned High Court judge did not find anything unusually wrong or unreasonable in the report produced by PW9 as the report was not seriously challenged by the defendants other than the challenge made by the defendants to PW9's experience in carrying out such evaluation.

[29] The counsels for the Government of Malaysia (Nurhafiza Azizan and Syeeda Marlim Uthman) in the earlier trial did not cross-examine PW9 on the damage of the machinery and equipment as mentioned in the report. Likewise, there was no cross-examination on the figures highlighted by PW9 as damages. The cross-examination questions mainly focused on challenging the preparation of the report (see encl 13, pp 132–142/173 pdf (Appeal 242)), they did not touch on the reliability of the costs of replacement or repair of the machinery and equipment. Therefore, the learned High Court judge was not wrong to accept that damage to the machinery and equipment had been proven as well as to accept the amount suggested as damages but with some adjustment. There is nothing plainly wrong for the learned High Court judge to come to the conclusion that Batu Kemas had proven the machinery and equipment were damaged and the proposed replacement or repair costs for the damaged machinery and equipment.

[30] The learned High Court judge awarded only RM35m for the claim, despite having accepted the report as unrebutted and unchallenged. The learned High Court judge awarded a lower amount because he had taken into consideration those factors as mentioned earlier to give a fair and just amount for damages which the learned High Court judge was entitled to do so.

[31] With regard to the discrepancy of the awarded sum found in the note of proceedings and the final order, since all parties have accepted the sum of RM35m as the awarded sum for the damages in para (f), therefore, this court would not disturb the awarded amount in the final order. With regard to the sum of RM RM58,911.857.10 offered as the replacement costs by the learned counsel for Batu Kemas, the learned High Court judge was entitled to reject it. The learned High Court judge was entitled to make adjustment of the two proposed amounts as damages which he considered as just and reasonable to come to a sum of RM35m.

[32] Based on the above analysis, this court finds no reason to disturb the findings of the learned High Court judge and his decision in para (f) of the assessment order.

TNB'S APPEAL (APPEAL 247)

First complaint — Documents marked as 'ID' in relation to paras (c) to (e)

[33] It is not in dispute that the documents that were used to support the damages claimed for paras (c) to (e) were marked as 'ID'. With regard to para (b), the document used to support the claim was the report which has been discussed earlier, and that the claim has subsumed into para (f). Therefore, it is not necessary to deal with para (b)'s supporting document.

Analysis

[34] As mentioned earlier, during the hearing of the assessment for damages, parties agreed that they would be relying on the evidence adduced during the trial and no further evidence was to be adduced by both parties. During the trial, at the end of Batu Kemas' case, it was recorded that the learned High Court judge Justice Choong Siew Khim (as she then was, now retired) stated this (see encl 15, p 33/232 pdf (Appeal 242); notes of proceedings dated 23 April 2012):

> Judge
>
> It's a different thing all together, and you see, the bundle of documents, part A, part B, part C, part A is no problem, authenticity and contents, B authenticity ok but contents, of course C is not a construe ... otherwise it is very difficult, we are going from A to B, B to C that kind of thing, so I think it makes no difference la, I'll decide on the admissibility, when I decide, because once I decide it is not admissible, I can disregard such documents, ok? So now, plaintiff is going to close your case?

[35] The parties before us did not disagree that the documents in support of paras (c) to (e) were not marked as exhibits of the court at the close of the earlier

trial. The relevant documents were also not marked as exhibits by the learned High Court judge Justice Abdul Wahab during the assessment of damages.

[36] This court observes that during the hearing for assessment of damages, the parties had mutually agreed to rely on the evidence adduced in the earlier trial. That means only documents marked as exhibits of the court could be considered by the subsequent court in the assessment of damages, not ID documents. It is trite law that no ID document shall be considered by the court as the same is not admitted as evidence before the court. Although the court is aware of the existence of such document which has been marked as 'ID', ie, identified document, the truth of the contents of that document could not be considered as its authenticity and contents are in question, until and unless it has been admitted as exhibit, or in other words admitted as evidence. It is only then the court could place any weight to such exhibit.

[37] It was further agreed by the parties that no further evidence was to be adduced during the hearing of the assessment of damages. In other words, the parties must abide by what had been admitted as evidence in the earlier trial.

[38] The learned High Court judge at paras [30] and [31] of his grounds of judgment stated as follows:

> [30] Having carefully scrutinised all evidence adduced before this court, I find that the plaintiff in the instant case had failed to adduce any evidence to show that the makers of the documents were dead, unfit by reason of their bodily or mental condition, beyond the seas or that it was it is not reasonably practicable to secure the maker's attendance within the meaning of s 73A(1)(b) of the EA 1950.
>
> [31] There was also no evidence adduced to show that attempts had indeed been made to call the relevant witnesses in order to absolve the plaintiff from the strict requirements of s 73A of the Evidence Act 1950. No reasonable explanation was given by the plaintiff as to their failure to call the makers. It was therefore in my considered view that the failure of the plaintiff to call the makers of the original documents rendered the said documents inadmissible as it had not fulfilled the best evidence rule required under s 73A of the Evidence Act 1950.

[39] The learned High Court judge even went on to consider s 73A of the Evidence Act for admissibility of the 'ID' documents, and the learned High Court judge was not satisfied that Batu Kemas had satisfied the requirements stated in the said section and held that Batu Kemas had not fulfilled the best evidence rule as required under s 73A of the Evidence Act 1950. We find the learned High Court judge was correct in his finding on this part of the ruling.

[40] However, the learned High Court judge went on to state as follows:

> [32] Irrespective of my above decision in respect to the admissibility of ID evidence, the plaintiff would nevertheless be entitled to claim for economic loss consequent to

physical damage as was held by the Federal Court. Sufficient evidence was adduced to show physical damages done to the machines, as such this court allows the plaintiff's claim from (a) to (c).

[33] The plaintiff had showed that Mr Otto Borghman alone had come to Malaysia for inspection at Batu Kemas. There is however no indication that other engineers had attended the inspection at Batu Kemas.

[34] For the foregoing reasons above, this court thus finds it reasonable to limit the award of damages to the plaintiff to the following claims:-

(a) Replacement cost of 2 machines for the sum of RM1,434,720.00;

(b) Brake motor for the sum of RM17,988.00;

(c) Transformer for the sum of RM4,136.00; and

(d) Technical advice for the sum of RM6,200.00;

[41] Although the learned High Court judge was satisfied that damage to the brake motor and transformer had been proven and that technical advice was rendered, that goes to proving liability, not proving damages. Therefore, the learned High Court judge could not for that reason arbitrarily allow the claims which were supported by 'ID' documents. This clearly goes against the rules of evidence in proving one's losses and damages.

[42] The decision of the learned High Court judge is frowned upon because documents marked as 'ID' were considered for awarding damages. If this is allowed to happen, the other party would be deprived of the opportunity to cross-examine the maker of the document as the maker was not called to verify the contents of the document.

[43] In addition, during the earlier trial, the evidence in support of the assessment of damages was adduced and ventilated, and those 'ID' documents were not marked as exhibit, vis a vis they were not evidence before the court and could not be considered. If not for the apex court's ruling that the matter be remitted back to the High Court for assessment of damages, the 'ID' documents would have been discarded at the end of the trial. To revive and consider the 'ID' documents at the stage of assessment of damages (after having been remitted back to the High Court by the Federal Court), would blatantly go against the rule of admissibility of evidence.

[44] Batu Kemas' counsel submitted that 'there was ample evidence from the documents marked as exhibits, and corroborated by oral testimony of Batu Kemas' witnesses, to show that Batu Kemas was entitled to those heads of claim.' This court opines that Batu Kemas could have well proved its entitlement to those heads of claim, but that does not translate to the amount of damages to be awarded. To prove the entitlement to a compensation amount

is distinct from proving entitlement to the heads of claim. This court could agree that Batu Kemas had suffered loss and damage, but whether Batu Kemas was entitled to claim the amount of the compensation still depended on what documentary evidence had been admitted as evidence for consideration of the court. The evidence before the court could not include documents marked as 'ID' or indirect documentary evidence suggesting potential losses and damages.

[45] Based on the above analysis, at the highest, this court could only accept to award a nominal sum of RM1,000 for each head of the claims as damages, namely, RM1,000 be awarded respectively for paras (c), (d) and (e).

Second complaint — Beyond the scope of assessment

[46] The learned counsel for TNB submitted that based on the wording of the Federal Court judgment, particularly para 103 (referring to the reported/published judgment), which states '… the Court of Appeal should not have ordered assessment of the whole claim. It should have ordered the assessment of only the alleged losses set out in para 102 of this judgment' (see *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal*, p 746).

[47] Para 102 of the apex court judgment states the alleged losses (the claimed economic losses consequent to physical damage) as follows:

> (i) replacement cost of two machines (RM1,434.720); (ii) the brake motor (RM17,988); (iii) cost of transformer (RM4,136); (iv) technical advice (RM6,200); (v) labour cost to manually pack the bricks (RM18,000); (vi) cost of two German engineers engaged to repair the machines for 21 days (RM103,757.11); and (vii) cost of mechanics, electricians, technicians and local supervisors (RM22,000).

[48] Therefore, the counsel for TNB submitted that the awarded sum for the head of claim for 'replacement cost' was outside the scope of the claim which was allowed by the Federal Court.

[49] In the amended statement of claim, with regard to special damages, Batu Kemas had pleaded items (a) ((i) to (vii)) to (e). Item (a) ((i) to (vii)) amounted to RM1,606,801.11 which was allowed by the Federal Court to be assessed (see para 3 of the Federal Court order dated 26 April 2018); and insofar as the special damages in item (b) to (e) are concerned, the Federal Court had rejected those claims (see para 1(a) to (d) of the Federal Court order). The pleaded items (a) to (e) are as follows:

A

Butir-Butir

1. Ganti Rugi Khas

(a) kerja dan caj-caj berkaitan, kos-kos memperbaiki/ tukarganti dan alat-alat lebihan/gantian:-

B

(i) Kos pemulihan/penggantian 2 unit BSP600 (DLC Control) -RM1,434,720.00

C

(ii) Brek Motor -RM 17,988.00
(iii) Transformer -RM 4,136.00
(iv) Kemahiran bagi Juruelektrik/juruteknik -RM 6,200.00
(v) Mesin membungkus tidak berfungsi menggunakan kuasa manusia untuk membungkus (Dasar Kontrak) -RM 18,000.00
(vi) Dua Jurutera daripada German untuk membaiki mesin bagi perbelanjaan 21 hari Matawang Jerman DM43,232.13 x @ 2.40 -RM 103,757.11
(vii) Bayaran kerja dan perbelanjaan bagi pekerja-pekerja Mekanik, Juruelektrik, Juruteknik, Pengawas tempatan -RM 22,000.00

RM 1,606,801.11

41

D

E

F

(b) kerugian akibat daripada kegagalan untuk memenuhi tempahan pelanggan atas alasan tanpa serahan -RM 4,368,363.20
(c) kerugian akibat daripada penarnatan oleh pelanggan-pelanggan atas alasan tanpa serahan -RM 40,710.40
RM 86,521.60
(d) kehilangan akibat daripada penalti yang dikenakan atas alasan tanpa serahan -RM 45,000.00
RM 60,000.00
(e) kerugian keuntungan akibat daripada ketidakbolehan menggunakan mesin-mesin -RM 5,120,541.36

G

RM11,327,937.67

H

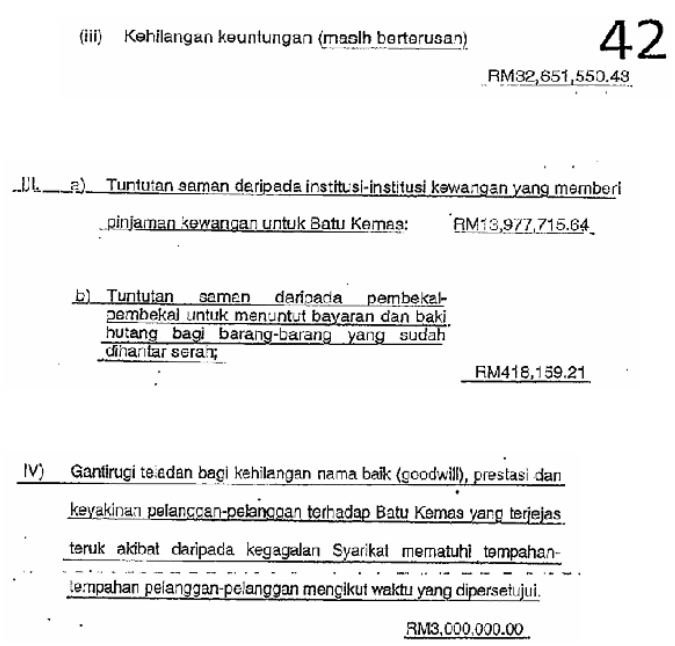
[50] With regard to the claim for general damages, Batu Kemas had pleaded three items, and they are as follows:

I

II. Ganti Rugi Am

(i) Kos-kos dan caj-caj bagi pembaikan dan penggantian yang akan disiap.

(ii) Kehilangan pengeluaran akibat daripada kerosakan kepada mesin Plaintif dan alatan-alatannya (masih berterusan);


(iii) Kehilangan keuntungan (masih berterusan) 42
RM32,651,550.43

(b) a) Tuntutan saman daripada institusi-institusi kewangan yang memberi pinjaman kewangan untuk Batu Kemas: RM13,977,715.64

b) Tuntutan saman daripada pembekal-pembekal untuk menuntut bayaran dan baki hutang bagi barang-barang yang sudah dihantar serah;
RM418,159.21

IV) Gantirugi teladan bagi kehilangan nama baik (goodwill), prestasi dan keyakinan pelanggan-pelanggan terhadap Batu Kemas yang terjejas teruk akibat daripada kegagalan Syarikat mematuhi tempahan-tempahan pelanggan-pelanggan mengikut waktu yang dipersetujui.
RM3,000,000.00

[51] Insofar as items (III) and (IV) are concerned, the Federal Court had rejected those claims (see para 1(e) to (h) of the Federal Court order).

[52] Therefore, based on Batu Kemas' amended statement of claim, what were left to be assessed by the High Court after the Federal Court decision were:

(a) claims for special damages, only item (a)(i) to (vii); and

(b) claims for general damages, only item (II)(i) and (ii).

[53] Item (II)(i) states 'Kos-kos dan caj-caj bagi pembaikan dan penggantian yang akan disiap'; and item (II)(ii) states 'Kehilangan pengeluaran akibat daripada kerosakan kepada mesin Plaintif dan alatan-alatan (masih berterusan)'.

[54] The relevant part of the Federal Court order reflecting the above finding is reproduced as below:

3) Tuntutan Batu Kemas untuk kerugian ekonomi akibat dari kerosakkan fizikal barangan seperti di bawah adalah untuk ditaksirkan oleh Mahkamah Tinggi Ipoh;

a) kos penggantian dua (2) mesin sebanyak RM1,434,720.00;

b) brek motor sebanyak RM17,988.00;

c) kos transformer sebanyak RM4,136.00;

d) nasihat teknikal sebanyak RM6,200.00;

e) kos buruh untuk membungkus bata-bata secara manual sebanyak RM18,000.00;

f) kos dua (2) jurutera Jerman yang dilantik untuk membaiki mesin selama 21 hari sebanyak RM103,757.11; dan

g) kos mekanik, juruelektrik, juruteknik dan penyelia tempatan sebanyak RM22,000.00.

4) Taksiran ganti rugi hendaklah termasuk:

(a) Kehilangan barangan di dalam pengeluaran dan keuntungan pada 5.8.1998;

(b) Kerugian pengeluaran dan keuntungan pada 5.8.1998; dan

(c) Kos penggantian mesin atau peralatan lain yang mengalami kerosakan fizikal atau kos pembaikkan.

[55] The above Federal Court order is also reflected in the judgment of the Federal Court at para [106] (see p 747) which is reproduced below:

> [106] For the reasons herein, we unanimously allow these appeals in part upon the following terms; (a) the claims as enumerated in para 103 of this judgment are dismissed; (b) the order of assessment of the Court of Appeal is set aside; (c) the quantum of the alleged loss and damage enumerated in para 102 of this judgment to be assessed by the High Court, which assessment to include (i) the loss of goods in production on 5 August 1998 and the profits thereof (ii) the loss of production on 5 August 1998 and the profits thereof, and (iii) the replacement cost of machinery or other equipment physically damaged or the repair cost; (d) the defendants to pay 2/3 of the loss and damage as assessed to the plaintiff, to be contributed by the defendants in the proportion of 40% (first defendant) and 60% (second defendant).

[56] It is clear from the order and the grounds of judgment of the Federal Court, High Court had assessed those items as ordered by the Federal Court, and below is the assessment order according to directions of the Federal Court:

a) Kerugian pengeluaran pada 5.8.1998 dan keuntungan di sana sebanyak RM7,262.32;

b) Kos penggantian dua (2) unit BSP 600 (DLC Control) sebanyak RM1,434,720.00;

c) Brek motor sebanyak RM17,988.00;

d) Kos transformer sebanyak RM4,136.00;

e) Nasihat teknikal sebanyak RM6,200.00;

f) Kos penggantian mesin atau peralatan lain yang mengalami kerosakan fizikal atau kos pembaikkan sebanyak RM35,000,000.00;

g) Bahawa daripada keseluruhan jumlah yang ditaksirkan, pembayaran oleh Defendan-Defendan adalah seperti berikut;

a. Defendan Pertama dan Defendan Kedua perlu membayar 2/3 dari kerugian dan kerosakan seperti yang ditaksirkan kepada Batu Kemas;

b. Liabiliti inter se antara Defendan Pertama dan Defendan Kedua adalah 40% (Defendan Pertama) dan 60% (Defendan Kedua);

h) Tiada perintah untuk faedah dan kos.

[57] Item (a) in the assessment order corresponds with para 4(b) of the Federal Court order. Items (b) to (e) correspond with paras 3(a) to (g) of the Federal Court order. For those items not mentioned in the assessment order but mentioned in the Federal Court order (items 3(e), (f) and (g)), it would mean the High Court found they were not proved. Item (f) in the High Court assessment order corresponds with para 4(c) of the Federal Court order. Hence, based on the above examination of the Federal Court order and the assessment order, this court finds the learned High Court judge did not act outside the scope of the Federal Court order and direction.

[58] In a final note, the Federal Court considered that the 'replacement costs' were part of the claim for economic loss consequent to physical damage, therefore, the Federal Court specifically mentioned in the order that 'taksiran gantirugi hendaklah termasuk kos penggantian mesin atau peralatan lain yang mengalami kerosakan fizikal atau kos pembaikan' in para 4(c) of the order.

[59] Based on the above reasoning, this court therefore rejects TNB's counsel's submission on this second complaint.

CONCLUSION

[60] As a result of the above findings, this court hereby makes the following orders:

(a) Appeal 242 — Government of Malaysia's appeal is hereby dismissed;

(b) Appeal 243 — Batu Kemas's appeal is hereby allowed to the effect that interest of 5%pa is chargeable on the judgment debt to be calculated from the date of the judgment (17 March 2022) until to the date of full payment; and

(c) Appeal 247 — TNB's appeal is hereby allowed in part to the effect that paras (c), (d) and (e) of the High Court order dated 17 March 2022 are to be amended to the sum of RM1,000 each as nominal damages.

[61] For the avoidance of doubt, we further order that para (b) in the High Court order dated 17 March 2022 be deleted, as the damages awarded therein

A has been subsumed in the damages awarded in para (f) of the same. Further, the judgment sum is to be amended to reflect the orders hereby given by this court.

[62] Lastly, we order that the parties to bear their own costs in all three appeals.

B

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh

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